

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA and the
KANSAS DEPARTMENT OF HEALTH AND
ENVIRONMENT, and Roderick L. Bremby as
Secretary of the KANSAS DEPARTMENT OF
HEALTH AND ENVIRONMENT,

Plaintiffs,

v.

UNITED STATES STEEL CORPORATION

Defendant.

Civil No. _____

COMPLAINT

The United States of America, by authority of the Attorney General through his undersigned attorneys, and at the request and on behalf of the United States Department of the Interior (DOI), in its capacity as natural resource trustee, the Kansas Department of Health and Environment (KDHE), and Roderick L. Bremby, Secretary of KDHE, in his capacity as Trustee for state natural resources in Kansas, allege as follows:

NATURE OF ACTION

1. This is a civil claim for natural resource damages brought pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(a), and section 311 of the Clean Water Act (CWA), 33 U.S.C. § 1321, for damages for injury to, destruction of, or loss of natural resources resulting from the release of hazardous substances at and from the Cherokee Lanyon #2 Site and the Girard Zinc Site in the

vicinity of Girard, Kansas.

JURISDICTION AND VENUE

2. This court has jurisdiction over the subject matter of this claim pursuant to 28 U.S.C. §§ 1331, 1345, 1362 and 2201; 42 U.S.C. §§ 9607(a) and 9613(b); and 33 U.S.C. §§ 1321(e)(2) and (n).

3. Venue is proper in this district pursuant to Section 113(b) of CERCLA, 42 U.S.C. § 9613(b); 33 U.S.C. § 2717(b); and 28 U.S.C. § 1391(b).

PARTIES

4. Defendant United States Steel Corporation (USS), is a corporation organized under the laws of Delaware with its principal place of business located in Pittsburgh, Pennsylvania.

5. Plaintiff the United States of America is a trustee for natural resources injured as a result of releases of hazardous substances caused by Defendant pursuant to federal statutes which include, but are not limited to, Section 107(f)(2)(A) of CERCLA, 42 U.S.C. § 9607(f)(2)(A), and Section 311(f)(5) of the Clean Water Act, 33 U.S.C. § 1321(f)(5). *See* Exec. Order No. 12,580, as amended by Exec. Order No. 12,077, 61 Fed. Reg. 45871 (Aug. 28, 1996); 40 C.F.R. § 300.600(b)(2).

6. Plaintiffs KDHE and the Secretary of KDHE are state trustees for natural resources injured as a result of releases of hazardous substances in Kansas, pursuant to statutes, which include, but are not limited to, section 107(f) of CERCLA, 42 U.S.C. § 9607(f), section 311(f)(5) of the CWA, 33 U.S.C. § 1321(f)(5), 40 C.F.R. § 300.605, and K.S.A. 61 - 171u.

GENERAL ALLEGATIONS

7. The Cherokee Lanyon #2 Site is approximately two acres in size and housed an operating zinc smelter works from the late 1800s to 1900. It has no standing structures though it once included eight furnaces, eight kilns, a coke oven, and several other buildings.

8. The Girard Zinc Site is approximately six acres and housed a zinc smelter works that operated from 1890 to 1902. The zinc works included at least four furnaces, two kilns, and a number of buildings, though now only foundations and fragments of slag, brick, and retorts remain.

9. As a result of the smelting operations at the Girard Zinc Site and Cherokee Lanyon #2 Site (collectively the Sites), the Sites' soil and groundwater became contaminated with various hazardous substances, including heavy metals (particularly arsenic, cadmium, and lead).

10. A small, ephemeral grassed waterway leads from the Cherokee Lanyon #2 Site to the southeast to Second Cow Creek. Water from the Girard Zinc Site flows into an ephemeral creek and into Second Cow Creek about 500 to 1000 feet from the Girard Zinc Site.

11. Cambridge Iron and Steel Co. and American Sheet Steel Co. owned and operated the smelters at the Girard Zinc Site and Cherokee Lanyon #2 Site until the companies merged to become Defendant in 1901.

12. Defendant owned and/or operated the facility at the Girard Zinc Site. Defendant is a successor to a former owner and/or operator of the facility at the Cherokee Lanyon #2 site and the Girard Zinc Site.

13. Under Section 107 of CERCLA, 42 U.S.C. § 9607, and 43 C.F.R. Part 11, the

Plaintiffs, in their roles as natural resource trustees, are entitled to recover damages for injury to natural resources, including (1) the cost to restore, replace, or acquire the equivalent of such natural resources; (2) the compensable value of lost services resulting from the injury to resources; and (3) the reasonable cost of assessing injury to the natural resources and the resulting damages.

14. Under Section 311(f)(4) of the Clean Water Act, 33 U.S.C. § 1321(f)(4), and K.S.A. 61 - 171u, the Plaintiffs are entitled to recover damages for injuries to natural resources, including the costs of restoring or replacing natural resources damaged or destroyed.

FIRST CLAIM FOR RELIEF
Natural Resource Damages Under CERCLA

15. The allegations set forth in paragraphs 1 through 15 are re-alleged and incorporated herein by reference.

16. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides in pertinent part as follows:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section –

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for -

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; . . .

17. Defendant is a person within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

18. Each site is a facility within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

19. Each former smelter is a facility within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

20. Hazardous substances were released from each of the facilities into the environment within the meaning of Sections 101(22) and 101(8) of CERCLA, 42 U.S.C. § 9601(22) and (8).

21. Defendant USS is within the classes of persons described in Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), because USS is a former owner, operator, or the successor to a former owner or operator of a facility from which hazardous substances were released.

22. The release of hazardous substances from each facility owned or operated by Defendant caused injury to, destruction of, and loss of natural resources in Second Cow Creek and the nearby area, within the meaning of Section 107(a)(4)(C) of CERCLA, 42 U.S.C. § 9607(a)(4)(c).

23. The natural resources that have been injured, destroyed, or lost as a result of the

release of hazardous substances from each facility operated by Defendant include migratory birds, their supporting ecosystems, and other “natural resources” as that term is defined in 42 U.S.C. § 9601(16), for which Plaintiffs are trustees.

24. The United States has incurred and continues to incur costs related to the assessment of the loss of natural resources for which the United States is a trustee, resulting from the release of hazardous substances from each facility owned and/or operated by Defendant.

25. KDHE has incurred and continues to incur costs related to the assessment of the loss of natural resources for which KDHE is a trustee, resulting from the release of hazardous substances from each facility owned and/or operated by Defendant.

26. Pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), Defendant is jointly and severally liable to the Plaintiffs for damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss, resulting from a release of hazardous substances at or from the Sites.

SECOND CLAIM FOR RELIEF
Natural Resource Damages Under the Clean Water Act

27. The allegations set forth in paragraphs 1 through 26 are re-alleged and incorporated herein by reference.

28. Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3), provides in pertinent part, as follows:

The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone... or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States ... in such quantities as may

be harmful as determined by the President under paragraph (4) of this subsection, is prohibited....

29. Section 311(f)(2) of the CWA, 33 U.S.C. § 1321 (f)(2), provides in pertinent part,

as follows:

Except where an owner or operator of an onshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United State Government, or (D) an act or omission of a third party without regard to whether an such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government....

30. Section 311(f)(4) of the CWA, 33 U.S.C. § 1321 (f)(4), provides in pertinent part,

as follows:

The costs of removal of oil or a hazardous substance for which the owner or operator of a vessel or onshore or offshore facility is liable under subsection (f) of this section shall include any costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil or a hazardous substance in violation of subsection (b) of this section.

31. Each facility owned or operated by Defendant is an onshore facility within the meaning of section 31 l(f)(1) of the CWA, 33 U.S.C. § 1321(f)(1).

32. There have been discharges of hazardous substances in harmful quantities into the Second Cow Creek, and adjoining shorelines in the vicinity of the Sites from each facility owned and/or operated by Defendant. Discharges of hazardous substances from each facility owned and/or operated by Defendant into Second Cow Creek, or adjoining shorelines have affected, damaged or destroyed natural resources belonging to, appertaining to, or under the exclusive management authority of the Plaintiffs.

33. Defendant is liable to Plaintiffs for natural resource damages resulting from discharges of hazardous substances into Second Cow Creek, or adjoining shorelines in the vicinity of the Sites pursuant to section 311(f) of the CWA, 33 U.S.C. § 1321(f).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

(1) Enter a judgment in favor of Plaintiffs against Defendant, for liability pursuant to CERCLA Section 107(a)(4)(C), 42 U.S.C. § 9607(a)(4)(C), for all damages for injury to, destruction of, and loss of natural resources at and near the Sites within the trusteeship of the United States, KDHE, and the Secretary of KDHE resulting from the release of hazardous substances at or from the Sites owned and/or operated by Defendant, including the unreimbursed past, present, and future costs of assessing such damages, the cost of restoring, replacing, and/or acquiring the equivalent of those injured resources, and the past, present, and future diminution in value of those resources pending restoration or replacement, in an amount to be proven at trial;

(2) Enter a judgment in favor of Plaintiffs against Defendant, pursuant to Section 311(f)(4) of the Clean Water Act, 33 U.S.C. § 1321(f)(4), for all costs of restoring, replacing, and/or acquiring the equivalent of natural resources damaged or destroyed as a result of the release of hazardous substances from each facility owned and/or operated by Defendant, and including the costs of assessing such damages and the diminution in value of those resources pending restoration or replacement, in an amount to be proven at trial.

(3) Enter a judgment in favor of Plaintiffs against Defendant for all costs of this

action, including attorney's fees; and

- (4) Award Plaintiffs such other and further relief as this Court may deem appropriate.

Respectfully submitted,

FOR THE UNITED STATES:

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